Filed 1/25/10 In re M.W. CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re M.W., a Person Coming Under the Juvenile Court Law. | |
| RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>A.R.,<br><br>Defendant and Appellant. | E045717<br><br>(Super.Ct.Nos. RIJ112624 & RIJ112034)<br><br>OPINION |

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Reversed.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Sophia H. Choi, Deputy County Counsel, for Plaintiff and Respondent.

Carl Fabian, under appointment by the Court of Appeal, for Minor.

A.R. (hereafter mother) appeals from the trial court's order in proceedings under both Welfare and Institutions Code sections 300 and 602[1] limiting her right to make educational decisions for her son, M.W. (hereafter M). Mother raises two claims of error in this appeal. First, she contends the trial court abused its discretion when it limited her right to make educational decisions for M. Next, mother contends that she was entitled to appointed counsel at the hearing at which the trial court limited her rights to make educational decisions, and failure to appoint counsel to represent her in that proceeding was prejudicial. We agree with this second claim and will reverse on that basis.

## FACTUAL AND PROCEDURAL BACKGROUND

M. and his seven siblings were removed from the care and custody of mother after Riverside County Department of Public Social Services (DPSS) filed a section 300 petition on May 1, 2006, that alleged among other things that M. and his siblings had suffered severe physical and emotional abuse while living with mother. DPSS placed all the children in foster care. Within two days M. ran away from his placement. Because M. had engaged in aggressive behavior directed at the foster mother and other children in the home, DPSS placed him in a Level 12 group home. That placement was also short lived because M. destroyed property and tried to goad staff members and the other children in the home into attacking him. From the group home DPSS took M. to

[1] All further statutory references are to the Welfare and Institutions Code unless indicated otherwise.

Behavioral Medical Center where he was held under section 5150 and ultimately diagnosed as suffering from major depressive disorder and intermittent explosive disorder. When M. was released on May 16, 2006, DPSS again placed him in a group home.

M. was in and out of group homes, shelter homes, and hospital mental health wards as a result of his behavior which included not only aggressiveness and threats to injure himself and others, but also acts of theft and burglary. On August 1, 2006, the District Attorney of Riverside County filed a Welfare and Institutions Code section 602 petition alleging that M. violated Penal Code section 496, subdivision (a) by receiving $22 which he knew had been obtained by theft. According to a multidisciplinary team assessment prepared in May 2005, appended to the probations officer's initial report in the Welfare and Institutions Code section 602 proceeding, M. qualified for special education because he had been diagnosed with learning disabilities and as a result attended special day classes at his middle school. At the initial hearing on the Welfare and Institutions Code section 602 petition on October 19, 2006, the trial court, among other things, ordered a psychological evaluation of M.

The DPSS social worker filed a report in the section 602 proceeding in which she recommended that M. be declared a ward of the court under section 602 and that all future dependency hearings be vacated. According to that report, since April 2006, M. had eight "failed placements," several hospitalizations on 5150 holds, and "facilities are unwilling to accept placement of the child" due to his "severe behaviors." Those

behaviors, according to the social worker, included refusing to take medication prescribed to address his behavioral issues; running away from his foster care placement on a daily basis only to return with illegal drugs that he then shared with other children in the home; physical aggression toward staff members and other residents of the home; and either refusing to attend his special education classes, or attending and then spending the entire day telling his teacher and classmates "to fuck off."[2] M. also caused "severe" property damage in each of his placements by, among other things, setting fires, punching holes in walls, and breaking windows.

In a report recounting the results of a joint investigation and assessment conducted by DPSS and the probation department (Probation), prepared at the trial court's direction and in accordance with section 241.1,[3] DPSS and Probation concluded that M.'s out-of-control behavior was the result of his rapidly declining mental health. According to the social worker's report, M.'s mental health needs far outweighed his criminal behavior. Therefore, the report recommended that the court consider M. for dual status under

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[2] The record on appeal includes 60 pages of incident reports documenting M.'s behavior problems.

[3] Section 241.1, subdivision (a) provides in pertinent part that when a child "appears to come within the description of both Section 300 and Section 601 or 602, the county probation department and the child welfare services department shall, pursuant to a jointly developed protocol described in subdivision (b), initially determine which status will serve the best interests of the minor and the protection of society. The recommendations of both departments shall be presented to the juvenile court with the petition that is filed on behalf of the minor, and the court shall determine which status is appropriate for the minor."

section 241.1, subdivision (e)[4] designating DPSS the lead agency, and that M. "be placed in Level 14 or other facility best suited to meet his needs in or out of the State of California." In the interim DPSS recommended that M. stay in juvenile hall. Probation filed a nearly identical report in connection with the 602 petition, recommending dual status under section 241.1, subdivision (e), with DPSS as the lead agency. In that report, the probation officer described M.'s behavior as "out of control." Both Probation and DPSS reported that M. is unable to read or write and has not attended school since April.

Because of M.'s behavior, DPSS reported that it could not find any facility willing to accept him. As a result, he remained in juvenile hall while DPSS and Probation searched for an appropriate placement. M. previously had qualified for special education as a result of identified learning disabilities. Both DPSS and Probation recommended that his Individual Education Plan (IEP) be updated.[5] That process required mother to participate in a meeting with representatives from the appropriate agencies and entities.

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[4] The social worker's report incorrectly designates the pertinent section as 241(e). Section 241.1, subdivision (e) authorizes "the probation department and the child welfare services department, in consultation with the presiding judge of the juvenile court, [to] create a jointly written protocol to allow [both departments] to jointly assess and produce a recommendation that the child be designated as a dual status child, allowing the child to be simultaneously a dependent child and a ward of the court."

[5] As described in the probation officer's initial report, M.'s IEP, which was last updated in 2005, identified M. with "Specific Learning Disability" and recommended special day classes for 71 percent of the time he attended public school. The IEP also recommended continued speech therapy and behavior support. According to the multidisciplinary team assessment attached to the IEP, M. had tested in the below average to borderline range. The assessment did not address behavioral issues.

Mother did not personally attend the meeting to update M.'s IEP, set for February 27, 2007, apparently because mother was upset that "the night before" child protective services "came to [mother's] house and took her baby. They returned the child later in the evening." Mother did participate in a telephone conference call in which she stated that "she would refuse to acknowledge any IEP meeting held without her being present."

Lawanda Martinez, identified in the record on appeal as the "Public Defender Educational Rights Paralegal,"[6] attended the February 27 IEP meeting and spoke with mother privately over the telephone at the conclusion of the meeting. Ms. Martinez reported, among other things, that mother intended to "exit" M. from special education services because she did not believe M. was benefitting: "He has received services since he was six years old and still could not read." Ms. Martinez explained that if mother "exits [M.] from Special Education Services, he will not be eligible for AB2726 services or placement."[7] Ms. Martinez added that if mother decides to exit M. from special education services it might be appropriate at that time to limit mother's education rights. Both the DPSS social worker and the probation officer agreed with Ms. Martinez.

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[6] Ms. Martinez "represents the best educational interests of the minor."

[7] Assembly Bill 2726 (Stats. 1996, ch. 654, p. 3654) amended what is now Government Code section 7576, which addresses mental health services for children with disabilities who are the subject of an IEP. According to the DPSS social worker's 12-month status review report dated January 29, 2007, M. had been screened and "was deemed eligible for" mental health services. The probation officer also stated in a report filed with the court on February 14, 2007, that a psychologist had evaluated M. and determined he qualified for mental health services under Assembly Bill 2726.

Mother had an informal IEP meeting on March 13, 2007, but that meeting was cut short when mother became hostile. According to the probation officer's report, at the rescheduled IEP meeting on April 3, 2007, mother disputed the psychoeducational evaluation that stated M. was emotionally disturbed. Mother feared M. would be placed out of state. Mother acknowledged that in 1999 M. was diagnosed with ADHD, and mother was not opposed to M. taking medication for that, but she strongly objected to him taking medication for depression. Mother and the disability rights attorney objected to the validity of the psychoeducational evaluation because mother had not been interviewed for that assessment. The parties agreed that a functional analysis assessment, which would evaluate M.'s behavior in school to determine if a behavioral support plan was needed, was appropriate. Hemet Unified School District psychologist Richard Kleindienst, Ph.D., was designated to conduct a second psychoeducational evaluation, a process that could take from 30 to 60 days. Participants in the IEP process agreed that it was in M.'s best interest to postpone the disposition hearing on the section 602 petition until the second psychoeducational evaluation was completed. The trial court continued that hearing from April 10, 2007, to May 10, 2007.

According to the probation officer's report filed May 3, 2007, DPSS had referred M. for placement at two out-of-state programs, both of which rejected him. M.'s behavior had deteriorated to such a degree that juvenile hall staff were not comfortable transporting him to a scheduled visit with siblings, so that visit was cancelled. Dr. Kleindienst reported on May 2, 2007, that in the course of preparing his

psychoeducational evaluation, he met with M. five times and that M. was cooperative and completed all the tasks and did not give up even when the assignments became difficult. Dr. Kleindienst's report should be ready and distributed "by the following week."[8] At the probation officer's request, the trial court continued the section 602 disposition hearing until May 23, 2007. On May 23, 2007, the trial court proceeded with the disposition hearing after the probation officer advised that M. had been accepted for placement at Silver Lakes. The trial court, among other things, adjudged M. a ward of the court, designated the case a dual status matter, designated Probation as the lead agency, delinquency as the lead court, and granted probation to M.

Probation placed M. at Silver Lakes on May 24, 2007. On June 13, 2007, Probation filed a notice of hearing on an allegation that M. violated his probation by leaving his placement at Silver Lakes without permission on three separate occasions, as set out in the accompanying detention report. On one of those occasions M. was found to be under the influence of a controlled substance and as a result the district attorney filed a subsequent petition on June 20, 2007, alleging M. had violated Health and Safety Code section 11550, subdivision (a).

At a hearing on July 2, 2007, M. admitted the probation violation and, based on that admission, the trial court found the allegation to be true. The court found that M.'s dual status designation continued to be appropriate, with Probation the lead agency and

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[8] If Dr. Kleindienst submitted that report, it is not part of the record on appeal, nor is it referred to at any hearing or in any other report prepared by a social worker or probation officer in this matter.

delinquency the lead court. Probation placed M. back at Silver Lakes Youth Services on July 2, 2007, and on July 5, 2007, M. again ran away. San Bernardino County Sheriff's deputies arrested M. that same day after he robbed a 19-year-old pregnant woman. The District Attorney of San Bernardino County filed a section 602 petition based on the robbery and that matter eventually was transferred to Riverside County. Probation filed a second probation violation on July 17, 2007, based on the July 5, 2007, robbery,[9] and M. ultimately admitted that violation.

Following his arrest in July, M. was detained in juvenile hall, first in San Bernardino County and then in Riverside County after the case was transferred. In the report prepared for the disposition hearing scheduled for October 10, 2007, the probation officer reported that the Riverside County Interagency Screening Committee recommended that M. be continued a ward of the court and committed to the Department of Juvenile Justice. In the probation officer's opinion, there were no other viable placements for M. given the seriousness of his most recent offense, his failure to comply with group home services while in placement through DPSS, and his failure to comply while in placement through Probation.

Despite the probation officer's recommendation, the trial court directed that M. remain in juvenile hall and that he undergo neurological evaluation. Scheduling that

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[9] As described in the report prepared by Probation, the victim was eight months pregnant and walking alone when M. "came up behind her. He put his hand over her mouth, dragged her to the ground and repeatedly told her he was going to "snap" her neck.

examination was difficult. Because the trial court's disposition of M.'s dependency and delinquency matters depended in large part on the outcome of the examination, the trial court, at the request of the probation officer, repeatedly continued the disposition hearing so that the neurological exam could be completed. At a hearing on February 25, 2008, M.'s attorney informed the court that the neuropsychological examination process had not yet been completed and that a new concern existed regarding whether M. "has a certain form of epilepsy that might describe his conduct." Based on the representation that the assessment process would be complete and an IEP meeting held during the week of March 10, 2008, the trial court continued the disposition hearing to March 26, 2008. In the meantime, M. remained in juvenile hall.

In the report prepared for the March 26 hearing, the probation officer stated, among other things, that according to a therapist at the Department of Mental Health, M.'s mental health report had been submitted to the school district, and the school district was "in the process of scheduling" the IEP meeting. According to the therapist, "once the IEP is conducted, the report can be attached for consideration of AB2726 services." With respect to the neurological examination, the probation officer reported that "an appointment has been scheduled for May 5, 2008." The probation officer requested yet another continuance of the disposition hearing, to May 26, 2008, "so [M.] can attend the IEP meeting and appointment with the Pediatric Neurology Specialist. Further, it is likely the neurologist and the IEP team will require time to evaluate the findings and prepare a report."

At the hearing on March 26, 2008, M.'s attorney first addressed the need for a continuance, presumably for all the reasons noted above in the probation officer's report. The trial court granted the continuance, setting the matter for further proceedings on May 27, 2008.[10] M.'s attorney also informed the court that "yesterday there was an IEP" and M. had been found to be emotionally disturbed. There was a recommendation that M. "receive AB2726 placement," but mother "refused to sign off." At the trial court's request, Ms. Martinez, the educational paralegal, explained the situation, the details of which we recount below, confirming that M. most recently had been diagnosed as emotionally disturbed, and mother would not agree to M. being placed at a residential treatment facility. Mother then explained her view that M. is not emotionally disturbed, and that she based her opinion on the psychoeducational assessment conducted by Dr. Kleindienst. After hearing mother's explanation, the details of which we also recount below, the trial court found that it was in M.'s best interest to "terminate" mother's educational rights and appoint a "CASA [court appointed special advocate] volunteer" to exercise those rights on M.'s behalf.

**DISCUSSION**

Before we address mother's claims we address the procedural issue of whether DPSS is the proper respondent, and if not what effect, if any, that error has on this appeal. In arguing that it has been wrongly identified as the responding party, DPSS points out

[10] DPSS had not conducted any review of M. since the preceding July, and at its request, the trial court also set the 18-month review hearing for May 27, 2008.

that the order at issue in this appeal was made in the delinquency proceeding, and that the trial court terminated M.'s dependency at a hearing on May 27, 2008. Because we are reversing and remanding this matter we need not determine whether DPSS is the correct respondent. Instead, we will remand the matter to the delinquency court because the dependency has been dismissed. (See *In re John W.* (1996) 41 Cal.App.4th 961, 974-975 [remand to family court after juvenile court terminated jurisdiction when exit order was entered].)

Turning to her claims, mother contends, as noted above, that it was an abuse of discretion for the trial court to restrict her right to make educational decisions for M., and in any event she should have been represented by counsel at the hearing at which the trial court made that order. Because failure to appoint counsel is the dispositive issue, we address only that issue in detail.

A court has authority in both dependency and delinquency proceedings to limit the right of a parent to make educational decisions for a dependent child of the court.[11] (§ 361, subd. (a); § 726, subd. (a).) "The limitations may not exceed those necessary to protect the child." (§ 361, subd. (a); see also Cal. Rules of Court, rule 5.650.) If the court limits the parent's right to make decisions regarding the dependent child's education, the court must appoint a responsible adult to make those decisions. (§ 361,

[11] Before a child is declared a dependent child, a court also may limit a parent's right to make educational decisions for the child under the circumstances set out in section 319, subdivision (g). That section is not at issue in this appeal.

subd. (a); § 726, subd. (b).) "In all instances, educational and school placement decisions shall be based on the best interests of the child." (§ 726, subd. (b)(5).)

The impetus for the trial court's decision to restrict mother's right to make educational decisions for M. was the representation by M.'s attorney that "yesterday there was an IEP" and M. "was found to be emotionally disturbed. There was a recommendation that he receive AB 2726 placement." M.'s attorney also stated his belief "that they have indicated that Millhouse in Sacramento might be an appropriate placement for someone with [M.'s] particular issues." According to M.'s attorney, mother would not sign off on the IEP. Ms. Martinez, the educational paralegal, informed the court that, with mother's agreement, M. "had three full psychoeducational assessments for social/emotional" to find out whether M. is emotionally disturbed. "One said no. One said OHI. Then as an agreement with mediation, the school district, and the parent, Dr. Wesley did a report, it was an IEE, an Individual Education Evaluation, and that one came back that he is emotionally disturbed in December." Ms. Martinez stated that mother "signed and agreed that [M.] was E.D. and at that time an AB 2726 referral for residential was made. [Mother] was talked to by mental health. [M.] was screened by mental health, and came back to the IEP yesterday where they were going to implement AB 2726 residential placement. [¶] The offer was made and [mother] rejected the offer and said she didn't want her son to go to that place. She will accept individual counseling, but does not want medication for him or the residential placement."

When the trial court asked mother what her thoughts were and whether she was unwilling to sign off on the IEP, mother stated that Dr. Kleindienst, the Hemet School District psychologist who had conducted one of the psychoeducational evaluations of M.,[12] explained to her "what E.D. means. And he said that he told all of them when we were in the IEP that he stands by 100 percent that my son is not emotionally disturbed. My son has a behavioral problem. There is a big difference." Mother asserted, "I have the right to not agree. I have a psychologist -- it's not my own opinion -- a psychologist sat down with me and the whole IEP team already less than a year ago and said my son is not emotionally disturbed. He [presumably referring to M.] knows what he is doing." Mother reiterated her understanding that she does not have to agree with the assessment and added, "They already have too many other psychologists that say he is not emotionally disturbed. I don't see why my educational rights should be taken just because you don't agree." As mother put it, "[T]hey want [M.] to run under this 'mental health' label. And they don't want him to be punished by probation for what he did. And I am saying, well, when he turns 18, I am going to be in court saying to the judge, 'Please don't give my son life.'" In short, mother stated, "They are not helping my son telling him to play mental health."

Based on the above noted statements, the trial court found because M. "is a dual status youth, he is a ward and a dependent. And as such, the Latin phrase 'in loco parentis' comes into play here. The Court is ultimately responsible for this Minor. The

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[12] Dr. Kleindienst is identified as Dr. Kleinstein in the reporter's transcript.

Court is acting in the role of a parent. And the Court ultimately will make what it believes to be an appropriate decision that is in the best interests of the Minor. [¶] And the court has concluded after hearing from the parties thus far, that the minor's educational needs are not being met by virtue of the mother's failure to -- or refusal to sign off on this IEP plan and potential placement. [¶] And accordingly, I will order that her educational rights be revoked." The trial court then appointed a court appointed special advocate as the "holder of [M.'s] educational rights."

Although the precise limits of a court's authority to restrict a parent's right to make educational decisions for a dependent child are not clear, at a minimum, section 361, subdivision (a), quoted above, requires that the restriction be necessary to protect the child.[13] As previously noted, the trial court in this case found that "terminating" mother's right to make educational decisions was in M.'s best interest. The trial court did not make the appropriate finding, which according to the statute is whether the limitation

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[13] Recently our colleagues in Division One of this court stated in *In re Samuel G.* (2009) 174 Cal.App.4th 502, that under section 361, subdivision (a), "The court has the authority to limit the right of a parent to make educational decisions for a dependent child of the court *if it appears the parent is unwilling or unable to do so*. [Emphasis added.]" (*Samuel G.*, at p. 510.) The emphasized language is not included in section 361, subdivision (a) which as quoted above states only that the limitation "may not exceed those necessary to protect the child." Nor is the emphasized language included in rules 5.650 or 5.695(c) of the California Rules of Court, the other authority cited by the court. Section 726, subdivision (a)(1) includes language similar to the emphasized language but it applies to the circumstances under which the court may take a child from the physical custody of a parent or guardian, namely, "That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the minor." In short, the emphasized language is not supported by any authority and therefore we will not rely on it.

is necessary to protect the child. Nor is there any evidence, in our view, to support a finding that limiting mother's right to make educational decisions was necessary to protect M.

That absence of evidence brings us to the issue of whether the trial court should have appointed counsel to represent mother at the March 26, 2008 hearing. Although mother was represented by counsel in the dependency proceeding, she was not represented by an attorney at the delinquency hearing at which the court purported to terminate her educational rights. DPSS concedes that the trial court should have appointed counsel to represent mother because her interest in maintaining her educational rights conflicted with M.'s desire, as expressed by his attorney, to have mother's rights terminated so that he could be placed in a residential facility. Because mother's interest and M.'s interest conflicted, the trial court was required to appoint counsel to represent mother. (See § 634, which provides in pertinent part that, "In any case in which it appears to the court that there is such a conflict of interest between a parent . . . and child that one attorney could not properly represent both, the court shall appoint counsel, in addition to counsel already employed by a parent . . . or appointed by the court to represent the minor or parent . . . .")

The remaining issue we must resolve is whether failure to appoint counsel for mother requires reversal of the trial court's order. The right to counsel at issue here is statutory, rather than of constitutional dimension, and therefore is subject to harmless error analysis on appeal, namely whether the error resulted in a miscarriage of justice.

(See, e.g., *In re Celine R.* (2003) 31 Cal.4th 45, 59 [failure to appoint counsel to represent each sibling in a dependency proceeding is subject to harmless error].) Accordingly, we must determine whether it is reasonably probable that the result would have been more favorable to mother but for the trial court's error. (*Id*. at p. 60.) More specifically, we must determine whether it is reasonably probable the trial court would not have limited mother's educational rights if mother had been represented by counsel.

The evidence supporting the trial court's order limiting mother's educational rights is comprised entirely of the above quoted statements by M.'s attorney, Ms. Martinez, and mother. Those statements established that M. qualified for special education as a result of identified learning disabilities but that he previously had not been diagnosed as emotionally disturbed, although references to the need for such a diagnosis in order to qualify for out-of-state residential placement are sprinkled throughout the record on appeal. The evidence that M. is emotionally disturbed is to say the least not overwhelming. According to Ms. Martinez, as previously noted, only one of the three psychoeducational assessments reached that conclusion. The record on appeal does not include copies of the pertinent IEP, or the results of the psychoeducational assessments conducted by either Dr. Kleindienst or Dr. Wesley. From the fact that those documents are not included in the record on appeal, we must assume they were not presented to the trial court. In our view, an attorney representing mother would have requested a hearing at which the pertinent psychological information to support the IEP would have been presented. Mother's view that M.'s issues were behavioral, rather than psychological,

was based on information she claimed she had obtained from Dr. Kleindienst. At the very least, an attorney representing mother's interest would have presented Dr. Kleindienst's report to the trial court. If the trial court had read the pertinent psychoeducational assessments, and/or heard testimony from the psychologists who prepared those assessments, the trial court might well have reached a different conclusion regarding whether M. is emotionally disturbed. As a result, the trial court might have reached a different conclusion regarding limiting mother's educational rights in order to protect M.

Under these circumstances, i.e., the limited evidence included in the record on appeal regarding whether M. was emotionally disturbed, we must conclude that a result more favorable to mother is reasonably probable in this case had mother been represented by counsel at the hearing in question. Accordingly, we conclude the trial court's error in failing to appoint an attorney to represent mother's interests was prejudicial. Therefore, we will reverse the order terminating mother's educational rights and remand the matter to the delinquency court for appointment of counsel to represent mother at any subsequent hearing on the issue of whether to limit mother's educational rights.

## DISPOSITION

The order entered on March 26, 2008, limiting mother's educational rights with respect to M. is reversed, and the matter is remanded to the delinquency court with directions to appoint counsel to represent mother in any subsequent hearing on remand regarding whether to limit her educational rights.

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/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Miller
J.